Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL WELP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit incorrectly applied a plain error standard of review to Petitioner's pre-*Blakely*/*Booker* sentence when Petitioner specifically objected to a judicially found drug quantity and obstruction of justice enhancement under the Federal Sentencing Guidelines and when a plain error standard of review conflicts with the rulings of other circuit courts on this issue?

2. Whether a constitutional *Booker* error requires remand per se because such error can never be reviewed under a harmless error analysis as it is a defect which effects the framework in which a trial proceeds and is therefore structural error?

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PETITION FOR WRIT OF CERTIORARI

Michael Welp respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The opinion in the Court of Appeals for the Eighth Circuit affirming the sentence of the District Court was issued per curiam on October 25, 2005, and is reprinted in the Appendix hereto at App. 1-3.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on October 25, 2005. App. at 4. Petitioner did not file a petition for rehearing in the Eighth Circuit. The present petition for writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3. This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for writ of certiorari, filed by a party to a federal criminal case, to review the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was indicted on July 21, 2003 for the single count of knowingly and intentionally distributing and possessing with the intent to distribute pseudoephedrine in violation of 21 U.S.C. § 841(c)(2).[1] The indictment consisted of a single sentence that did not allege or quantify the amount of pseudoephedrine, or allege the defendant would be subject to any enhancements under Chapter 3 of the United States Sentencing Guidelines ("U.S.S.G."). The trial commenced on October 2, 2003. The district court had proper jurisdiction pursuant to 18 U.S.C. § 3231, which provides that the district courts shall have original jurisdiction of "all offenses against the laws of the United States."

The evidence at trial indicated that the Petitioner had been identified as a supplier of pseudoephedrine pills to

[1] The source for the Statement of the Case is Petitioner's brief on appeal unless there are citations to the Appendix attached to this Petition.

one Ryan Buchheim, a cooperating individual who provided the Petitioner's name to law enforcement. An undercover law enforcement officer initially met with Petitioner on March 13, 2003, and arranged a purchase of pseudoephedrine from Petitioner at a later date. The undercover officer bought a sample bottle and agreed to buy an additional 71 bottles of pseudoephedrine for $1,200.00 from Petitioner. Petitioner met with the officer that day and sold the 72 bottles containing approximately 255.6 grams of pseudoephedrine. The agent indicated at that meeting that he was going to "make some shit."

Later that same day, the undercover agent made another call to Petitioner and arranged a third meeting at which Petitioner was to deliver an additional 144 bottles of pseudoephedrine containing approximately 518 grams of the drug. The Petitioner was arrested when delivering these drugs. A search warrant was executed at the Petitioner's home where he resided with his family and more pseudoephedrine was found. Petitioner also admitted he had more pseudoephedrine located at a warehouse used by his father's business, Jim's Foods, who Petitioner was an employee of, and also used by NS Distributing, the Petitioner's distribution company. Invoices at the warehouse indicated that the pseudoephedrine seized was bought through the above businesses.

The cooperating witness in the case, Mr. Buchheim, testified at trial that he was arrested in possession of 2,887 pills and that he had a safe containing 39,000 pseudoephedrine pills. Mr. Buchheim testified that he obtained all of the pills from Petitioner. An undercover agent testified Petitioner told him he knew what the pseudoephedrine was used for.

The jury returned a verdict of guilty on October 3, 2003 utilizing separate verdict forms for whether the Defendant distributed pseudoephedrine knowingly or having reasonable cause to believe it would be used to manufacture methamphetamine and whether the Defendant possessed pseudoephedrine with such knowledge in violation of 21 U.S.C. § 841(c)(2).

The first sentencing hearing was held on May 11, 2004. Prior to the hearing, Petitioner filed his Sentencing Brief, attached hereto as Appendix Pages 15-35. The Sentencing Brief made specific objections to the amount of pseudoephedrine used in determining Petitioner's base offense level. App. at 15-23. An objection was also made to an obstruction of justice enhancement. App. at 20. Petitioner objected to the calculation of the base offense level as a violation of due process of law. App. at 15.

The court held a second sentencing hearing on June 4, 2004. At the second sentencing hearing the judge found the relevant quantity to be 2.8 kilograms resulting in a base offense level of 36 under U.S.S.G. § 2D1.11 (2004). App. at 36-37. The quantities included the purchases from the undercover officers which amounted to 345.6 grams. *Id.* Also included were pills from Ryan Buchheim which included an amount of 173.22 grams from prior deliveries and an amount of 2321.10 grams taken from Mr. Buchheim's home safe. *Id.* Petitioner objected to all of these amounts. App. at 15-23. The judge further found a two-level enhancement under U.S.S.G. § 3C1.1 (2004) for obstruction of justice, increasing Petitioner's base offense level to 38. App. at 37-38. Petitioner was a criminal history category I, which resulted in a sentencing range of 235-293 months. The statutory maximum for the crime charged was 240 months resulting in an effective range for Petitioner of

235-240 months. Petitioner, a first-time offender, was sentenced to 235 months, the low end of the guideline range.

Petitioner appealed to the Eighth Circuit challenging the court's determination of drug quantity and the application of the enhancement for obstruction of justice under *Blakely v. Washington,* 124 S. Ct. 2531 (2004). Petitioner filed his brief on January 4, 2005, approximately one month prior to the decision of this Court in *United States v. Booker*, 125 S. Ct. 738 (2005). The Eighth Circuit affirmed Petitioner's sentence on October 25, 2005. App. at 1.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT INCORRECTLY APPLIED A PLAIN ERROR STANDARD OF REVIEW BECAUSE CIRCUIT PRECEDENT PRIOR TO THE *BLAKELY/BOOKER* DECISIONS PRECLUDED OBJECTIONS ON SIXTH AMENDMENT GROUNDS AS "FRIVOLOUS" AND THE PLAIN ERROR STANDARD IS IN CONFLICT WITH OTHER CIRCUIT COURTS.

A. Plain Error Standard of Review

Petitioner submitted his brief in the Eighth Circuit relying on the principles announced by this Court in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), and *Ring v. Arizona*, 122 S. Ct. 2428 (2002), which stated that a defendant may not have his sentence increased by facts not admitted by him or found beyond a reasonable doubt by a jury. Subsequent to the submission of Petitioner's brief to the Court of

Appeals on January 4, 2005, this Court entered its decision in *United States v. Booker*, 125 S. Ct. 738 (2005), making the United States Sentencing Guidelines advisory due to inherent flaws that violated a defendant's Sixth Amendment rights.

In its per curiam decision, the Eighth Circuit stated that the District Court "sentenced Welp based in part on facts found by a preponderance of the evidence and applying the Guidelines in a mandatory fashion which was error under *United States v. Booker*, 125 S. Ct. 738 (2005)." App. at 2. The Eighth Circuit then utilized the plain error standard of review to deny relief. App. at 2. This ruling is consistent with other Eighth Circuit cases which have held that a failure to make a very specific objection to the mandatory nature of the Sentencing Guidelines, or a specific Sixth Amendment challenge in the district court, results in a plain error standard of review. *See United States v. Pirani*, 406 F.3d 543, 550-52 (8th Cir. 2005) (en banc). Petitioner suggests that this was the improper standard of review in light of circuit precedent prior to *Blakely v. Washington, supra*, and in light of the rulings of other circuit courts in the aftermath of *United States v. Booker, supra*.

It is not reasonable to require a criminal defendant to make a specific *Booker/Blakely* type of objection prior to the issuance of either opinion. At the time Petitioner was sentenced, such an objection was entirely contrary to circuit precedent. The clear and unambiguous law in the Eighth Circuit before the *Booker* and *Blakely* holdings was that this Court's ruling in *Apprendi, supra*, did not apply to the Sentencing Guidelines calculations and enhancements. In fact, the Eighth Circuit described the *Apprendi* argument that a sentencing court could not judicially find

facts by a preponderance of the evidence as "frivolous." *United States v. Banks*, 340 F.3d 683, 684-85 (8th Cir. 2003). The Eighth Circuit had specifically rejected the argument on numerous occasions before Petitioner was sentenced. *Id.*; *see also United States v. Alvarez*, 320 F.3d 765, 766-67 (8th Cir. 2002) ("[W]e have squarely rejected these contentions" that *Apprendi* invalidated findings under the Guidelines); *United States v. Piggie*, 316 F.3d 789, 791 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 157 (2003); *United States v. Diaz*, 296 F.3d 680, 683 (8th Cir. 2002), *cert. denied*, 537 U.S. 940 (2002).

In light of these holdings, Petitioner was prejudiced by the application of the restrictive plain error standard because he failed to make a specific objection challenging the mandatory nature of the Guidelines even though such an objection was contrary to all circuit precedent at the time and even labeled as "frivolous" by one opinion. The prejudicial nature of the application of this standard of review was even recognized by several opinions in the Eighth Circuit that initially concluded that a general objection was sufficient to preserve *Blakely/Booker* error. *See, e.g.*, *United States v. Coffey*, 395 F.3d 856, 860-61 (8th Cir. 2005), *aff'd*, 415 F.3d 882 (8th Cir. 2005) (en banc); *United States v. Selwyn*, 398 F.3d 1064, 1066-67 (8th Cir. 2005); *United States v. Sdoulam*, 398 F.3d 981, 995 (8th Cir. 2005); *United States v. Fox*, 396 F.3d 1018, 1026-27 (8th Cir. 2005). These opinions, however, were overruled by *Pirani*, 406 F.3d at 550.

The Petitioner objected to the findings of drug quantities in the Pre-Sentence Investigation Report at the district court level as well as an enhancement for obstruction of justice under U.S.S.G. § 3C1.1. The Petitioner's sentencing brief outlines the objections that were made.

App. at 15-35. Precedent in the circuit at the time did not allow a constitutional objection for judicially found facts, and Petitioner should not now be penalized by the use of the plain error standard of review with regard to issues raised on appeal.

B. Circuit Split

In addition to the improper use of the plain error standard of review, the Petitioner also suggests that the Eighth Circuit misapplied the plain error standard of review to cases involving *Booker* issues that were not specifically raised at the district court level. *See Pirani*, 406 F.3d at 550-52. In *United States v. Olano*, 113 S. Ct. 1770 (1993), this Court held that, in order to satisfy the plain error test, the defendant must demonstrate (1) error, (2) that it is plain, and (3) that it affects substantial rights. If these three prongs are satisfied, the appellate court may, in its discretion, notice the error if it seriously effects the fairness, integrity, or public reputation of the judicial proceedings. *See United States v. Cotton*, 122 S. Ct. 1781 (2002).

The Eighth Circuit, as well as other circuits, has defined *Booker* error as an error that is plain. Similarly, the Eighth Circuit has found that the third prong of the plain error test turns on whether a defendant "has demonstrated a reasonable probability that he would have received a more favorable sentence with the *Booker* error eliminated by making the Guidelines advisory." *Pirani*, 406 F.3d at 551, *see also United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005).

Other circuit courts of appeal disagree with the approach taken by the Fifth, Eighth, and Eleventh Circuits with regard to the third prong of the plain error test. The Eighth Circuit has found that a "reasonable probability" of a violation of substantial rights does not exist simply because a sentence was imposed at the bottom of the guideline range. *Pirani*, 406 F.3d at 551. The *Pirani* court suggests that if the "district court had opined that the sentence produced by the mandatory Guidelines was unreasonable" such opinions might be relevant, but that a general dislike of the guidelines as set forth in the record was not relevant to plain error review. *Id.* at 553, n. 6; *see also*, *United States v. Fields*, 408 F.3d 1536 (11th Cir. 2005); *United States v. Leisure*, 412 F.3d 857 (8th Cir. 2005). As discussed herein, the First, Second, Third, Sixth, Seventh, Ninth, and D.C. Circuits disagree with the holdings of the Fifth, Eighth, and Eleventh Circuits in this regard.

The problem with the Eight Circuit's position is outlined in *United States v. Antonakopolous*, 399 F.3d 68, 81 (1st Cir. 2005), where the court found that, "The existence of prejudice should not turn on how vocal the district judge was." The Ninth Circuit agreed, stating:

> It would be most unfair and unreasonable for us to ground our prejudice on the fortuity of whether a defendant was sentenced by a particular sentencing judge who openly criticized the Guidelines, or indicated that they were unduly harsh as applied to a particular defendant rather than one who felt constrained to quietly follow the law. Our judicial system is predicated on judges following the law, and, so far as is humanly possible, keeping their personal opinions to themselves.

United States v. Ameline, 409 F.3d 1073, 1105 (9th Cir. 2005).

The Eighth Circuit analysis is also contrary to other circuits that have expressly found a sentence at the low end of the guideline range was sufficient to meet the third prong of the plain error analysis. *See United States v. Henry*, 408 F.3d 930 (7th Cir. 2005); *United States v. Hamm*, 400 F.3d 336 (6th Cir. 2005).

The Second, Ninth, and D.C. Circuits have held that prejudice in the context of *Booker* plain error can only be fairly assessed by a limited remand to the district court for a determination of whether the same sentence would have been imposed under an advisory guideline system. *See, e.g., United States v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005); *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Ameline, supra.*

The Third Circuit took it a step further and remanded every case with a *Booker* issue pending on direct review in order to, "[e]nsure that each defendant to whom *Booker* applies is sentenced accordingly. This approach results in uniform treatment of post-*Booker* defendants on direct appeal, fostering certainty in the administration of justice and efficient use of judicial resources." *United States v. Davis*, 407 F.3d 162, 165 (3rd Cir. 2005). The Petitioner respectfully suggests that all federal defendants with appeals pending when *Blakely* and *Booker* were decided should be entitled to this approach.

The approach favored by the Fifth, Eighth, and Eleventh Circuits was criticized harshly by Judge Posner of the Seventh Circuit in *Paladino, supra.* He stated, referring to *Rodriguez, supra*, "[g]iven the alternative of

simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit would want to condemn some unknown fraction of criminal defendants to serve an illegal sentence." *Paladino*, 401 F.3d at 485. He also opined that, "[t]he only practical (and it happens also to be the shortest, the easiest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge." *Id.* at 483.

The Petitioner and others in the Fifth, Eighth, and Eleventh Circuits are currently having their unconstitutional sentences reviewed under a more burdensome standard of review than those in other circuit courts. Such a difference results in a conflict that can only be reconciled by review of this Honorable Court. This Court should grant this Petition for Writ of Certiorari in order that the administration of justice is properly and uniformly administered in all circuit courts which involve defendants of like standing.

II. A CONSTITUTIONAL *BOOKER* ERROR IS STRUCTURAL IN NATURE BECAUSE SUCH ERROR IS A DEFECT EFFECTING THE FRAMEWORK IN WHICH THE TRIAL PROCEEDS AND THE HARMLESS ERROR DOCTRINE IS LIMITED TO *BOOKER* CASES NOT INVOLVING A SIXTH AMENDMENT VIOLATION.

In the case presented before this Court, Petitioner argues not only that the Eighth Circuit improperly applied the plain error standard of review requiring remand or a harmless error analysis, but also that the use of a harmless

error analysis for a Sixth Amendment violation of *Booker* is precluded for being structural error.[2]

Recently this Court granted certiorari in the case of *State of Washington v. Recuenco*, 126 S. Ct. 478 (2005), to address the question of whether the decisions in *Blakely v. Washington*, *supra*, and *Apprendi v. New Jersey*, *supra*, preclude the use of harmless error analysis because *Blakely* and *Apprendi* violations constitute structural error.

The Supreme Court of Washington in *State v. Recuenco*, 110 P.3d 188 (Wash. 2005), relying heavily on a previous case in its jurisdiction, *State v. Hughes*, 110 P.3d 192 (Wash. 2005), stated that, "In *Hughes*, this Court considered the applicability of harmless error analysis to *Blakely* Sixth Amendment violations and held that such violations can never be deemed harmless because to do so would be to speculate on the absence of jury findings." *Recuenco*, 110 P.3d at 192.

Structural error is error from a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 111 S. Ct. 1246, 1265 (1991). "Structural errors are said to 'defy' harmless error review because they are 'so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to

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[2] Petitioner recognizes that some circuits have held that *Booker* error is not structural. *See generally, United States v. Antonakopolous*, 399 F.3d 68 (1st Cir. 2005) (non-constitutional *Booker* error is not structural); *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005) (non-constitutional *Booker* error is not structural); *United States v. Dowlin*, 408 F.3d 647 (10th Cir. 2005) (constitutional *Booker* error is not structural).

their effect on the outcome.'" *State v. Allen*, 615 S.E.2d 256, 267 (N.C. 2005), *citing Neder v. United States*, 119 S. Ct. 1827 (1999).

This Court held in *Sullivan v. Louisiana*, 113 S. Ct. 2079 (1993), that a reasonable doubt instruction which was constitutionally deficient could never be harmless. The court in *State v. Hughes* explains exceptionally well how *Sullivan* applies to *Blakely* error:

> The [*Sullivan*] Court reasoned that because there was not a proper reasonable doubt instruction, there had not been a jury verdict of guilty beyond a reasonable doubt. Thus, there was nothing upon which to apply the harmless error analysis to conclude that, but for the error, the result would have been the same. To the contrary, the court would only have been speculating on how the jury *would have found* if they had been correctly instructed.
>
> This is directly analogous to the situation presented by judges, rather than juries, finding facts necessary to increase sentences. In each case at hand, there was no jury finding beyond a reasonable doubt of aggravating factors warranting an enhanced sentence. It would be illogical to perform harmless error analysis on the absence of those findings. There is no object upon which to apply harmless error analysis. Instead of asking whether but for the error the findings *would have been the same*, the court would be asking whether but for the error the findings *would have been different*. Such an analysis is the equivalent of speculating on the jury's verdict which the Supreme Court has never allowed.

State v. Hughes, 110 P.3d at 205-206.

In discussing *Booker*, the Supreme Court of North Carolina stated that Justice Breyer's remedial opinion suggesting the use of prudential doctrines such as plain error and harmless error analysis in lower courts refers simply to appellate review of *statutory error* resulting from a sentencing judge applying the Federal Guidelines in a mandatory fashion. *Allen*, 615 S.E. 2d at 270. However, "Constitutional error arising from a Sixth Amendment violation is not the subject of Justice Breyer's remark." *Id.* The *Allen* court also suggests that the *Booker* opinion distinguishes statutory and constitutional error. It states, "Justice Stevens' majority opinion identifies constitutional error, concluding that the 'Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines." *Id. citing Booker*, 125 S. Ct. at 746. The *Allen* court goes on to say that "Justice Breyer's suggestion that 'application of the harmless error doctrine' may determine 'whether resentencing is warranted' is expressly limited to '*cases not involving a Sixth Amendment violation.*'" *Id. citing Booker*, 125 S. Ct. at 769. Consequently, the *Booker* opinion itself recommends a harmless or plain error review of statutory errors. But, interestingly, *Booker* was remanded for its constitutional error. Thus, the proper standard of review for Sixth Amendment, constitutional *Booker* violations is not expressly given, but it can be inferred from the *Booker* remand. It is Petitioner's argument that such constitutional *Booker* Sixth Amendment violations are structural in nature requiring a per se remand.

In the case at bar, Petitioner was sentenced under a mandatory guidelines scheme in which a judge made findings of fact that enhanced defendant's sentence mandatorily. Such an enhancement is considered constitutional

Booker error. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 731 (10th Cir. 2005), *citing Booker*, 125 S. Ct. at 756.[3] Petitioner objected to the quantities at sentencing. App. at 15-19. The judge at sentencing determined the quantities of precursor drugs involved in the relevant conduct. App. at 36-37. The judge also enhanced, over objection, Petitioner's sentence two (2) levels for obstruction of justice. App. at 37-38.

The state courts of Washington and North Carolina in *Hughes, Recuenco*, and *Allen*, clearly demonstrate why a *Blakely* error should be considered structural and remanded per se. The analysis of this Court's decision in *Booker* regarding Sixth Amendment constitutional error suggests that constitutional *Booker* error should also be treated as structural and remanded per se as a harmless error analysis is an insufficient standard by which a violation of a defendant's Sixth Amendment rights can be remedied.

CONCLUSION

This Honorable Court should grant Petitioner's petition for writ of certiorari on Question No. 1 because of a conflict in courts of appeal on the issue of plain error review of a sentence which was imposed in violation of this Court's decision in *Booker*. Moreover, should this Court in

[3] Non-Constitutional *Booker* error is defined as "applying the Guidelines in a mandatory fashion, as opposed to a discretionary fashion, even though the resulting sentence was calculated solely on facts admitted by the defendant, found by the jury, or based upon the fact of a prior conviction." *Gonzalez-Huerta*, 403 F.3d at 731-32, *citing Booker*, 125 S. Ct. at 769.

the *Recuenco* case decide that *Booker* error is structural, then this Court should grant certiorari in this case on Question No. 2 and reverse and remand this case back to the Eighth Circuit for further review in light of the decision in *Recuenco*. Additionally, Petitioner prays for such other and further relief as to this Court seems just and proper in the premises.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2398

United States of America,	*	03CR0074
	*	
Appellee	*	Appeal from the United
	*	States District Court for
v.	*	the Northern District of
	*	
Michael Welp,	*	Iowa
Appellant.	*	[UNPUBLISHED]

Submitted: September 30, 2005
Filed: October 25, 2005

Before BYE, McMILLIAN, and RILEY, Circuit Judges.

PER CURIAM.

Michael Welp appeals from a final judgment entered in the District Court[1] for the Northern District of Iowa upon a jury verdict finding him guilty of distribution and possession of pseudoephedrine, knowing or having reasonable cause to believe it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(2). The district court sentenced Welp to 235 months imprisonment and 3 years supervised release. For reversal, Welp argues that the district court erred in sentencing him based in part on judge-found facts and in its application of the Sentencing Guidelines. For the reasons discussed below, we affirm the judgment of the district court.

[1] The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

The district court sentenced Welp based in part on facts it found by a preponderance of the evidence and applying the Guidelines in a mandatory fashion, which was error under *United States v. Booker,* 125 S. Ct. 738 (2005). However, Welp concedes that he did not preserve the error in the district court. Accordingly, we review only for plain error. *See United States v. Pirani,* 406 F.3d 543, 549-50 (8th Cir. 2005) (en banc), *petition for cert. filed,* (U.S. July 27, 2005) (No. 05-5547). Welp cannot meet his burden to establish plain error because, even though he was sentenced at the bottom of the applicable sentencing range, he cannot show a reasonable probability that he would have received a more favorable sentence if the district court had treated the Guidelines as advisory, rather than mandatory. *See id.* at 551-53 (sentence at bottom of range, without more, is insufficient to demonstrate reasonable probability that court would have imposed a lesser sentence absent *Booker* error).

We further hold that the district court did not clearly err in finding that the quantity of pseudoephedrine involved in the offense was at least 1 kilogram for purposes of Welp's offense conduct under the Guidelines. *See United States v. Gramling*, 417 F.3d 891, 896 (8th Cir. 2005) (clear error standard of review); *United States v. Ziesman*, 409 F.3d 941, 955 (8th Cir. 2005) (in determining drug quantity, district court may consider all drugs that were part of same course of conduct). Moreover, there is ample evidence in the record supporting the district court's finding that Welp sold the pseudoephedrine with the knowledge or reasonable cause to believe that it would be used to manufacture methamphetamine. Therefore, we also hold that the district court did not clearly err in finding, for purposes of the obstruction-of-justice enhancement under

U.S.S.G. § 3C1.1, that Welp intentionally testified falsely under oath when he denied having the knowledge or belief that the pseudoephedrine he sold would be used to manufacture methamphetamine. *See United States v. Galaviz-Luna*, 416 F.3d 796, 800 (8th Cir. 2005) (clear error standard of review); *Ziesman*, 409 F.3d at 956 ("A district court applying the obstruction-of-justice enhancement for perjury must review the evidence and make an independent finding, by a preponderance of the evidence, that the defendant gave false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.") (internal quotation marks omitted).

Finally, the district court recognized its authority to depart. We therefore hold that the denial of Welp's motion for a downward departure under U.S.S.G. § 5K2.13 is unreviewable. *See United States v. Gonzalez-Ramirez*, 350 F.3d 731, 734 (8th Cir. 2003) (denial of § 5K2.13 motion held unreviewable where district court acknowledged authority to depart but denied motion based on defendant's failure to substantiate his claim of diminished capacity).

Accordingly, we affirm. We also deny the pending pro se motions.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2398

United States of America,	*	03CR0074
Appellee,	*	Appeal from the United States District Court for the Northern District of Iowa
vs.	*	
Michael Welp,	*	
Appellant.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199) October 25, 2005

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: **CR 03-74-LRR**
MICHAEL WELP	USM Number: **09033-029**
	Jon Hammond, Attorney at Law Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) 1 of the 07/21/2003 one-count Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
21 U.S.C. § 841(c)(2)	**Distribution and Possession of Pseudoephedrine Knowing It Would Be Used to Manufacture Methamphetamine**	**03/13/2003**	**1**

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Counts(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in economic circumstances.

June 4, 2004
Date of Imposition of Judgment

/s/ Linda R. Reade
Signature of Judicial Officer

Linda R. Reade
U.S. District Court Judge
Name and Title of Judicial Officer

June 4, 2004
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **235 months**.

■ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a Bureau of Prisons facility as close to his family as possible, commensurate with his security and custody classification needs.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED
STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable).

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable).

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as he is released from the program by the probation officer.

2) The defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns or

others establishments whose primary source of income is derived from the sale of alcohol.

3) The defendant shall participate in a mental health treatment program, including an assessment and counseling for a possible gambling problem, as directed by the probation officer, until such time as he is released from the program by the probation officer.

4) The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 100**	**$ 0**	**$ 0**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However,

pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.
☐ the interest requirement for the ☐ fine
☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

A ☐ Lump sum payment of $_____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, ☐ F below; or

B ■ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES
OF AMERICA

Plaintiff, NO. CR03-0074 LRR

vs. **DEFENDANT'S SENTENCING BRIEF**

MICHAEL WELP,

Defendant.

COMES NOW, the Defendant, and submits his Sentencing Brief.

I.

APPLICATION OF GUIDELINES 2D1.11 TO THE DEFENDANT'S CONDUCT CONSTITUTES A VIOLATION OF HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE 14TH AMENDMENT

A Defendant in a criminal case has an entitlement to equal protection under both the 5th Amendment and the 14th Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). In order for a statute to survive a challenge on an equal protection ground, the statute must be rationally related to a legitimate government purpose. A statute not involving a suspect class or a fundamental right enjoys a strong presumption of validity and will survive an equal protection challenge if it is irrationally related to a legitimate government purpose. *U.S. v. Carter*, 91 F.3d 1196 (8th Cir. 1996). The question in the present case is whether the application of the sentencing scheme set out in U.S.S.G., Section 2D1.11 for possession of pseudoephedrine with knowledge or reasonable cause to believe it

would be used to make methamphetamine is not rationally related to a legitimate government purpose and is therefore violative of the Defendant's right to equal protection. The Defendant asserts that the scheme set out in 2D1.11 lacks a rational basis because the punishment provided for delivery or possession of pseudoephedrine with a criminal intent and possession or manufacturing of the methamphetamine which it would be used to produce, are so disparate.

It is a scientific fact that pseudoephedrine cannot be converted into methamphetamine on a 100% basis and that there is a maximum theoretical conversion of 92%. See *U.S. v. Eide*, 927 F.3d 701 (8th Cir.2002). In practice, the actual conversion rate for pseudoephedrine into methamphetamine is between 15 to 60%. The scheme set out in Section 2D1.11 fails to take the scientific facts into account. In *Eide*, Chemist Patricia Krahn of the Iowa Division of Criminal Investigation testified based upon analysis of the materials found in that case, along with an analysis of the bi-product (CMP) revealed that the defendant there had a "fairly good conversion rate" of 40 to 50% yield from a pseudoephedrine precursor. The evidence further indicated that an Iowa DCI study had found conversion rates for pseudoephedrine to methamphetamine between 15 to 29% (when CMP levels were high) to 35 to 63% (when CMP levels were low). Either rate, whether 15 to 29% or 35 to 63%, are applied to the highest theoretical yield of pseudoephedrine into methamphetamine which was testified by Krahn to be 92%.

The scheme set out in 2D1.11 fails to take the scientific fact into account. Even if the statute punished the possession of pseudoephedrine on an equal basis with methamphetamine, that is, scoring 1 gram of pseudoephedrine to

be equal in punishment with one gram of methamphetamine, this statute would lack the rational basis because of the maximum theoretical conversion of 92%. In actuality, however, it provides for a higher punishment of the raw material than an equal amount of the finished product. Accordingly, there is no rational basis for the sentencing scheme set out in 2D1.11

For the sake of comparison, the Defendant would be a level 32 for possession of 100 grams but less than 300 grams of pseudoephedrine, under 2D1.11(d). Possession of 50 to 200 grams of methamphetamine or at least 5 grams to 20 grams of actual methamphetamine, however, is punished only at a level 26. Possession of at least 200 but not less than 300 grams of methamphetamine or at least 20 but not more than 35 grams of actual methamphetamine is punished at a level 28. There is no rational basis for this disparity.

Again, for the sake of comparison, if the Defendant were charged with possessing 100 grams of pseudoephedrine and if that pseudoephedrine were converted to marijuana as provided in Section 2D1.1(10), he would be punished for the equivalent of 1,000 kg of marijuana, a level 30 offense.

The statute also fails to take into account the actual conversion rate of pseudoephedrine to methamphetamine as described by the government's expert in *Eide*. There, the Court noted that estimating the amount a lab is capable of manufacturing may be determined from the quantity of the chemicals together with expert testimony, but the yield figures cannot be calculated with regard for the particular capabilities of a defendant and the site. Thus, the evidence must be based not on a theoretical

yield, but what on the defendant could produce and not what an "average cook" is capable of yielding. *Eide* at 701.

The statute in question takes none of these variables into account, yet the nature of the offense is that the materials were possessed with the knowledge or with having reasonable cause to believe they would be used to manufacture methamphetamine. Congress cannot rationally find a harm in the possession or sale of pseudoephedrine independently of the harm created by the methamphetamine which it is used to produce. Thus, the punishment must in some way relate to the dangers associated with the use of methamphetamine. Because 2D1.11 provides for higher punishment for pseudoephedrine than for the actual methamphetamine which it can be used to produce, it lacks a rational relationship between the punishment provided and the danger presented by pseudoephedrine.

The Defendant is not unmindful that Congress may create a statute which provides for the punishment for the possession of methamphetamine with certain criminal intent in circumstances where the accused is not arrested in connection with an actual methamphetamine lab. Congress may rationally provide a punishment for individuals caught providing the raw material used to create contraband where they do so with the knowledge it will be used for that purpose. They must, however, tailor the punishment to fit the offense. It is the Defendant's position that the Court must make a determination as to the amount of pseudoephedrine which constitutes relevant conduct in his case and then make a determination as to the amount of methamphetamine which could be produced from that amount of pseudoephedrine. The Court should then apply the methamphetamine guideline

to the Defendant's conduct. Defendant urges the Court to determine the total amount of pseudoephedrine which constitutes the Defendant's relevant conduct, apply the 92% theoretical yield, and in turn apply no more than a 40% yield from that amount of pseudoephedrine and determine his sentence accordingly.

II.

SUMMARY OF THE ARGUMENT

It is the Defendant's contention that, in light of the jury's verdict, the Defendant maybe held responsible for the sale of 72 bottles containing 60 pills each of 60 mg of pseudoephedrine, or 4,320 pills, totaling 259 grams. This is a level 32 offense, because it is between 100 and 300 grams. The Defendant's second delivery on the same day was 144 bottles with 60 pills in each bottle containing 60 mg of pseudoephedrine, totaling 518 grams. If this amount is aggregated with the first sale, the total is approximately 777 grams, which is in the range of between 300 grams to 1 kilogram, a level 34 offense.

If the Defendant's relevant conduct is 259 grams of pseudoephedrine, the maximum theoretical yield of actual methamphetamine from that amount is 238.28 grams, and a conversion rate of 40% of that amount is 95.31 grams of actual methamphetamine, a level 30 offense. If the Defendant's relevant conduct is 777 grams, the maximum theoretical yield is 714.84 grams of actual methamphetamine and a conversion rate of 40% results in a yield of 285.94 grams of actual methamphetamine, a level 32 offense.

The Defendant argues that the second sale constitutes sentencing entrapment and, if it is used to determine the

Defendant's relevant conduct, a departure from level 34 to level 32 is appropriate.

The Defendant argues that he is not subject to an increase for obstruction of justice in that his allegedly false statements made at trial were neither false nor material. At level 32 with a criminal history category of I, the Defendant's sentencing range is 121 to 151 months.

The Defendant next urges the Court to depart downward based upon the Defendant having suffered from a pathological gambling disorder as that term was defined in DSM IV and 5K2.13, and will introduce evidence to show that in the approximately 6 months between his last delivery to Ryan Buchheim and March 13, 2003, the Defendant's gambling had increased in quantity and frequency, that he had voluntarily barred himself from 2 casinos because of his excessive gambling, and that he suffers from pathological gambling, a conduct disorder, in the opinion of an individual licensed to diagnose such illnesses. Defendant will also introduce evidence that his criminal acts are aberrant behavior as that term is defined in Section 5K2.20.

A. THE OFFENSE CONDUCT.

The Defendant was indicted for a violation of 21 U.S.C. §841(c)(2) and convicted on October 3, 2003. The issues at the Defendant's sentencing with regard to his offense conduct include what quantities of pseudoephedrine should be included as relevant conduct: (1) pseudoephedrine provided by Mr. Welp to Ryan Buchheim on occasions prior to the controlled purchase of March 13, 2003; (2) the amounts of pseudoephedrine delivered to Agent Josh Loupkes on March 13, 2003 and (3) the amounts of pseudoephedrine recovered from the Defendant's home and a storage garage.

I. The trial testimony does not support a finding that Defendant's deliveries to Ryan Buchheim were done with the knowledge or with reasonable cause to believe that pseudoephedrine would be used to manufacture methamphetamine.

The evidence with regard to what the Defendant knew regarding Ryan Buchheim's intent is limited to the testimony of Mr. Buchheim and the Defendant. The Defendant did not at any time make admissions that he had knowledge that Buchheim, or anyone else, would make methamphetamine from the pseudoephedrine he delivered to Buchheim. The Defendant makes available to the Court as an exhibit to his Brief the relevant portion of Mr. Buchheim's testimony concerning this issue. (See Exhibit "A"). The excerpts include pages 146 through 150, and 187. (These excerpts are recited in the Defendant's objections to the preliminary draft of the PSIR.

Mr. Buchheim's testimony does not support a finding that he ever provided the Defendant with sufficient information from which the Defendant could know or even have a reasonable belief that Buchheim would be either manufacturing methamphetamine, or providing it to others to manufacture. It is significant that sales of pseudoephedrine, even in large quantities, are insufficient to support the inference that the Defendant knew or had reasonable cause to believe. The Court's own Instruction 18 correctly charged the jury that the government must present credible evidence of sufficient quantity and quality to prove the Defendant had a reasonable belief based upon the evidence presented at trial, and that it was not enough to show that the manufacture of methamphetamine would be predictable to a member of the public, or even that it was reasonably foreseeable

that it may be used to manufacture methamphetamine. In the present case, there is nothing but an inference to support a finding that quantities delivered to Ryan Buchheim before March 13, 2003 were relevant conduct to the sales occurring on March 13, 2003. Accordingly, the Defendant's objection should be sustained and these quantities disregarded at sentencing.

II. The quantities allegedly delivered to Ryan Buchheim are miscalculated in the PSIR, even if they constitute relevant conduct.

The Defendant has attached as his Exhibit "B" a printout from the cash register of Jim's Foods which tracks the sales of all pseudoephedrine acquired from Olympus Distributing. This document, along with the testimony of Mr. Welp, will establish that of the pills purchased from Olympus Distributing, Mr. Welp sold 141 boxes of 30 mg pills, and 1,575 bottles of 60 mg pills.

30 mg. pills	60 mg. pills
1,152 boxes – (amount purchased by Welp from Olympus)	2,888 bottles – 60 mg. pills purchased by Welp through Olympus
-1,141 boxes sold to Jim's Foods	-1,575 bottles sold to Jim's Foods
11 boxes (528 pills) unaccounted for	-72 delivered to Loupkes (1st purchase 3/13/02)
	-144 delivered to Loupkes (2nd purchase 3/13/02)
	-72 bottles recovered from Welp's home
	-576 bottles recovered from storage garage
	441 bottles (26,460 pills) unaccounted for

Accordingly, Mr. Buchheim could not have received 40,000 pseudoephedrine pills from Mr. Welp, and the Court should reject any request to find that quantity of pills to be the Defendant's relevant conduct.

III. The quantities of pseudoephedrine recovered from the Defendant's home and the storage garage are not relevant conduct.

There was testimony the Defendant possessed pseudoephedrine pills at his home and in a storage garage. There is an absence of testimony as to the Defendant's intention regarding these pills. He has made no admissions as to his state of mind, and no witness has been called by the government to establish his state of mind with regard to the pills. Accordingly, there is no basis on which to include these amounts in the Defendant's relevant conduct.

B. THE OBSTRUCTION ENHANCEMENT.

The Defendant does not qualify for an enhancement for obstruction or impeding administration of justice under Application Note 4 of U.S.S.G. §33E.1 in that his statements at trial were neither false nor material. The obstruction of justice adjustment is a sentencing enhancement, and therefore the burden providing the facts necessary to support the adjustment lies with the government. *U.S. v. Willis*, 940 F.2d 1136 (8th Cir. 1990). The adjustment cannot be given simply because the Defendant testifies on his own behalf and the jury disbelieves him. The district court itself must find the Defendant committed perjury before making the upward adjustment. *Willis* citing *U.S. v. Dyer*, 910 F.2d 530, 533 (8th Cir., cert. den. 498 U.S. 907, 1990). No enhancement should be imposed

based upon the Defendant's testimony if a reasonable trier of fact could find the testimony to be true. *Willis* at 1140.

Application Note 2 to U.S.S.G. 3C1.1 points out that a defendant's denial of guilt which does not constitute perjury does not serve as the basis of the enhancement, and cautions the Court as follows:

> "In applying this provision in respect to an alleged false statement or statements by the Defendant, the Court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice."

The allegedly perjurous statement must also be material as that term is defined in Application Note 6. Material evidence is therein defined to mean "Evidence, fact, statement or information that, if believed, would tend to influence or effect the issue under determination."

The question in the present case is whether the Defendant testified falsely at trial about what he had previously told Agent Aboud. (Agent Aboud's testimony appears at pages 199, 208, and 209.) Aboud testified:

> "He told me that pseudoephedrine, he knew it was used to manufacture meth, was strictly a business transaction and he made money or other transactions." (Tr., pgs. 199, 200).

Upon cross-examination, he testified:

> Q. And he never said to you, "I knew that Ryan Buchheim was going to use these pills to make methamphetamine or give them to

somebody else to make methamphetamine." Did he?

A. No.

Q. And he never said to you he had cause to believe Mr. Buchheim would, either, did he?

A. No.

Q. Now you quoted him in your testimony that he was saying that he knew pseudoephedrine was used to make methamphetamine, is that right?

A. Right.

And later, he testified:

Q. Did Mr. Welp at any time in this interview deny knowing that pseudoephedrine was used to make methamphetamine?

A. No, he never denied it.

(See Exhibit "C").

The Defendant's testimony is also excerpted and appears on pages 261, as follows:

Q. Did Agent Aboud say to you anything about pseudoephedrine being used to make methamphetamine?

A. Yes he did.

Q. Did you ever deny that knowledge in your conversations with him?

A.

Q. In other words, did you tell him "I didn't know that"?

A.

Q. What was his response?

A. I don't believe you.

And at page 263:

Q. At any time did you think you might have said to him, "I know now that its used to make methamphetamine"?

A.

The following colloquially provides no basis for an enhancement under this section. First, by the Defendant's own testimony, he may have stated to the agent that he "now" knew it would be used to manufacture methamphetamine. That statement is not so inconsistent with Agent Aboud's testimony as to provide a basis for a finding that it is perjurous or obstructive. Further, the statement, even if it were inconsistent with the testimony given by Aboud, is nevertheless immaterial to the question before the jury. In order for the answer to be material, it would have to tend to influence or affect the issue under determination. The issue under determination is whether the Defendant knew or had reasonable cause to believe that the pseudoephedrine he provided Agent Loupkes would be used to make methamphetamine. The Defendant's knowledge that pseudoephedrine might, in the abstract, be used for such a purpose, would be insufficient to establish that he in fact knew or, that the circumstances surrounding the sale gave him reasonable cause for him to know, that it might be. In other words, the jury would not have to resolve the truth or falsity of the statement in order to answer the ultimate question of the Defendant's state of mind when he delivered the pseudoephedrine to Agent

Loupkes. As such, it is not material. If it is not material, it cannot serve as the basis for an enhancement or be perjurous.

C. DEPARTURES.

II. Sentencing Entrapment.

The Guidelines recognize sentencing entrapment as a viable basis for a downward departure. U.S.S.G. 2D1.1, Comments on Notes 12, 15. The Eighth Circuit applied these standards in *U.S. v. Searcy*, 233 F.3d 1096 (8th Cir. 2000), noting that sentencing entrapment occurs when official conduct leads the Defendant predisposed to deal only in small quantities of drugs than to deal in larger quantities, leading to an increased sentencing. The focus of the sentencing entrapment analysis is on the predisposition of the Defendant to commit the crime. *Searcy* citing *U.S. v. Stuart*, 923 F.2d 607, 613-14 (8th Cir. 1991).

The theory behind sentencing entrapment is that outrageous government conduct overcomes the will of the Defendant predisposed to deal only in small quantities of drugs and that the Sentencing Guidelines may have a "terrifying capacity for escalation of a defendant's sentence" as a result of the government's misconduct. *U.S. v. Barth*, 990 F.2d 422, 424 (8th Cir. 1993). In *Searcy*, the Court noted that the focus is not on whether the government's conduct is outrageous, rather, the facts should be evaluated by focusing on the Defendant's predisposition.

The facts in the present case are that the Defendant was solicited by law enforcement to commit the offense, not merely on one occasion, but on two. By inducing the Defendant to make a second sale based upon the promise

of additional profit, the government has manipulated the Defendant's sentencing range precisely in the manner that caused the *Searcy* court to note, "the danger of government abuse is great because in many cases, including this one, the government may influence, and in some cases control, the quantity and kind of drug involved in the offense." *Searcy* citing *U.S. v. Barth*, 990 F.2d 422, 424 (8th Cir. 1993).

There is a particular danger in the present case because the pseudoephedrine possessed by the Defendant in storage is not relevant conduct. Had the government not arranged for a second buy from the Defendant, he would be in a lower sentencing range. Had they arranged for further buys, he would arguably be in a higher range. In the present case, the Court should depart downward to the level established by the Defendant's first sale to Agent Loupkes only in order to avoid manipulation of the Defendant's sentencing range by the government.

II. 5K2.13 – Diminished Capacity.

Defendant requests that the Court depart from the otherwise applicable guideline range pursuant to Section 5K2.13 – Diminished Capacity. This section provides that a sentence below the applicable range may be warranted if the Defendant was suffering from a significantly reduced mental capacity and the significantly reduced mental capacity contributed substantially to the commission of the offense. The application note explains that:

> "Significantly reduced mental capacity" means the Defendant, although convicted, has a significantly impaired ability to: (A) understand the wrongfulness of the behavior comprising this

> offense or to exercise the power of reason; or (B) control behavior that the Defendant knows is wrongful."

Courts which have addressed this issue have found that in 1998 the Sentencing Commission redefined the phrase "significantly reduced mental capacity" in such a way as to include volition impairments, including gambling disorders. See *U.S. v. Sadolski*, 234 F.3d 938 (6th Cir. 2000). 5K2.13 does not require a direct causal link between the reduced mental capacity and the crime charged, rather, it encompasses cases where the reduced mental capacity was a contributing cause of the offense, even if it were not the sole cause of the offense. *Sadolski* citing *U.S. v. Cantu*, 12 F.3d 1506, 1515 (9th Cir. 1993).

The *Sadolski* Court noted that the Diagnostic and Statistical Manual of Mental Disorder (the DSM IV) is recognized as the standard text of the American Psychiatric Association and lists pathological gambling as an impulse control disorder. *Sadolski* at 944. In *U.S. v. Liu*, 267 F.Supp.2d 371 (Ed. NY 2003), the Court granted a departure where the Defendant proved by a preponderance of the evidence that his pathological gambling addiction impaired his ability to control behavior that he knew was wrong. *Liu* at 374. The Court noted there was "a dearth" of cases addressing the issue of whether pathological gambling addiction can constitute a significantly reduced mental capacity under Section 5K2.13 of the Guidelines. As in *Sadolski*, the *Liu* Court addressed the significance of the 1998 Guidelines Amendment and agreed that a pathological gambling addiction may constitute a significantly reduced mental capacity under Section 5K2.13 where the evidence indicates that the Defendant

suffered from the addiction, and that his condition led to the crime. *Sadolski* at 375.

In the present case, prior to March 13, 2003, the Defendant had made no sales of pseudoephedrine to anyone for approximately 6 months. All of his prior sales were to Ryan Buchheim. The circumstances surrounding his sales to Buchheim were set out in Buchheim's testimony. During this 6-month period, the Defendant had an alarming increase in the frequency and amounts of his gambling as evidenced by his financial records, and the fact that on two occasions he volunteered to be banned from casinos. (See documents regarding Defendant's gambling, reproduced as Exhibit "F". Then in March, he received a phone call offering to purchase pseudoephedrine which the Defendant already possessed. The Defendant agreed.

The evidence indicates that the Defendant did so in order to acquire money to perpetuate his gambling; to pay gambling debts; and to have more available for future gambling. It also indicates that during this period of time, the Defendant was suffering from the impulse control disorder described in the DSM IV as pathological gambling. (See DSM IV, Section 321.31, Pathological Gambling, reproduced as Exhibit "D", Curriculum Vitae of Diane Kepros, Exhibit "E1" and Report, Exhibit "E2".) The Defendant met the following criteria: (1) the Defendant clearly was preoccupied with gambling, (2) needed to gamble with increasing amounts of money in order to have the desired excitement; (3) had repeated unsuccessful attempts to control, cut back, or stop gambling; (5) gambled as a way of escaping from problems or relieving a dysphoric mood; (8) after losing money, often returned another day to get even (chasing his losses), committed

illegal acts to finance gambling; (9) jeopardize a loss of a significant relationship, job, or opportunity because of gambling; (10) and lied to others to provide money to relieve a desperate financial situation caused by gambling. A score of 5 or more would indicate the diagnosis of pathological gambling. *Liu* at 373.

The Defendant's pathological gambling contributed directly to the commission of the offense. He could not control his behavior even when faced with the circumstances which the jury indicated should have given him reason to believe he was doing something wrong.

If a departure is warranted under the policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense. (5K2.13 – Policy Statement.

It is significant to note the Defendant sought out no other customers other than Ryan Buchheim. The Defendant responded to the opportunity to sell to Agent Loupkes at a time when his gambling addiction was particularly severe. The Defendant did not create the circumstances under which the sale took place; he only responded to a request knowing it would provide him with money which he could then apply to future gambling. As such, the Court should find that he is entitled to a reduction to a significant degree in light of the fact that his need for gambling money contributed significantly to the commission of the offense.

III. 5K2.20 – Aberrant Behavior.

The Defendant also requests that the Court depart from his sentence based upon an act of aberrant behavior.

Section 5K2.20 addresses the issue of aberrant behavior, limiting the circumstances to only those where the Defendant committed a single act of criminal occurrence or a single criminal transaction committed (1) without significant planning; (2) of limited duration; and (3) representing a marked deviation by the Defendant from an otherwise law-abiding life. Application Note 2 indicates that repetitious or significant, planned behavior would not meet the requirements of that subsection. Application Note 3 directs the Court to consider the Defendant's mental and emotional conditions, his employment record, his record of prior good works, his motivation for committing the offense, and efforts to mitigate the effects of the offense.

The Defendant has no significant prior criminal record. His only offense is a simple misdemeanor to which he plead guilty without counsel. His criminal history category is I.

The Defendant's offense convictions occurred in 1 day, only hours apart. He was convicted of a single count. The Defendant qualifies under 5K2.20(b) as having committed "a single criminal occurrence". The offense was committed without any planning, as the Defendant was already in possession of pseudoephedrine. The pseudoephedrine which he had previously acquired had been sold to Ryan Buchheim. There is an inadequate showing that the Defendant committed any criminal offense when he made those prior sales to Buchheim. Thus, there was no planning of a commission of the offense for which he was convicted, and no instances of prior violations of that statute. His offense was of limited duration and it marked a deviation from an otherwise law-abiding life.

The Defendant's actions in making the sales on March 13, 2002 should not be seen as repetitious or significant planned behavior. First, that behavior which he did previously engage into with Mr. Buchheim has not been shown to be a criminal act. Further, there was no planning that he would sell to another in a way that would violate the statute for which he was convicted. Rather, he responded to a phone call placed to him by the agent after 6 months of inactivity. There was no planning for the sale to Agent Loupkes, and no indication that the Defendant violated the statute on previous occasions. Thus, neither of the Application Notes would discourage a departure under 5K2.20.

The Defendant is an individual with a severe gambling problem, a solid employment record, a long-history of working for his father in the family store with the goal of taking over the family store, and with the motivation for committing the offense to obtain more money to feed his gambling addiction.

In *U.S. v. Iaconetti*, 59 F.Supp.2d 139 (D. Mass. 1999), the Court dealt with the interplay of aberrant behavior and a gambling disorder. Mr. Iaconetti was similarly diagnosed with a pathological or compulsive gambling disorder but strove to pay his debts. There the Court noted that his conscience could have inhibited him from performing illegal actions, or even seeking them out, but it was not until the combination of his desperation arising from his compulsive gambling was coupled with the unexpected opportunity to reduce his debt that he committed the present crime, an action that was out of keeping both his character and his previous behavior. *Iaconetti* at 146. There the Court departed from a level 25 to a level 14, and

the Court released the Defendant to address the profound problems he faced.

IV. 5K2.0 and *Koon v. U.S.*, 518 U.S. 81 (1996).

The Court must make a refined assessment of the many facts bearing on the outcome of the case formed by his vantage point, dated experience and criminal sentencing. *Koon* at 247. The Court must determine whether the misconduct that occurred in the particular instance suffice as to make the case atypical. The answer is apt to vary depending on the severity of the misconduct, its timing, and the disruption it causes. *Koon* at 247. It is the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study of the human failings, sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. *Koon.*

The Court has the authority to depart from mitigating circumstances under U.S.S.G. §5K2.0 if there exists in the record a variety of enumerated factors which take the case out of the heartland of similar cases. In the present case there are a variety of circumstances of a kind not applicably taken into consideration of the formulation of the guidelines, many of which have been discussed above.

These factors, together and in combination, provide a basis for the Court to depart downward. They include but are not limited to the Defendant's lack of a prior significant criminal record, the fact that transactions occurred on a single day, Defendant's motivation to acquire money with which to engage in gambling in furtherance of his conduct disorder, the unusually harsh nature of the

sentence scheme provided under 2D1.11, and great disparity in sentencing between pseudoephedrine and the finished product of methamphetamine in light of the conversion rate of the two substances, the unavailability of a safety valve reduction for the Defendant despite the fact his conduct is being punished as part and parcel of a methamphetamine-related offense for which a co-conspirator or manufacturer would otherwise be eligible for safety valve treatment by statute and under the guidelines, the Defendant's strong family support in the community, and the Defendant's age.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on May 4, 2004.

By: ☐ U.S. Mail
☐ Hand Delivered
☐ Federal Express
☐ Facsimile
☐ Overnight Courier
■ E-File

Signature: /s/ Jeanine S. Allinger-Kanellis

/s/ Jonathan B. Hammond

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	CR 03-74
Plaintiff,	)	VOLUME II
VS.	)	
MICHAEL WELP,	)	
Defendant.	)	

APPEARANCES:

ATTORNEY KANDICE WILCOX, Assistant U.S. Attorney, Suite 400, 401 First Street S.E., P.O. Box 74950, Cedar Rapids, Iowa 52407-4950, appeared on behalf of the United States.

ATTORNEY JONATHAN B. HAMMOND, of the firm of Klinger, Robinson & Ford, 401 Old Marion Road N.E., P.O. Box 10020, Cedar Rapids, Iowa 52410-0020, appeared on behalf of the Defendant.

SENTENCING HEARING,

held before the Hon. Linda R. Reade on the 4th day of June, 2004, at the Federal Building, 101 First Street S.E., Cedar Rapids, Iowa, commencing at 2:00 p.m.

* * *

[95] cross-examination of him. But here are the quantities that I find: The 3/13/03 controlled – first controlled buy from Special Agent Lupkes, the sample bottle, 3.6 grams; the first buy from the agent on the 13th, 255.6 grams; the second buy from Agent Lupkes of 86.4 grams; and all the pills from Buchheim, first, the 173.22 grams, and then all

the pills from the safe, 2,321.10 grams. And if my math is correct, that is 2,839.92 grams or 2.8 kilograms. The Court, therefore, finds that the base offense level would be thirty-six.

I want to just add a little bit from my notes with regard to Defense Exhibit B. I specifically find that that was not credible testimony nor a credible exhibit because the preparer did not indicate or know the dates covered. He did not furnish the underlying documentation for examination. He is not a disinterested witness, and he assumed that all the invoices recovered were all the pseudoephedrine that had been ordered, and the Court finds that that is just not supported.

The Court rejects the argument that no crime was committed here because in fact

* * *

[99] has not met his burden of showing he's entitled to acceptance of responsibility.

Now I will talk about where I end up then before I address the downward departure issue. All right. On Page 10 of the report, the Court finds the base offense level is thirty-six. The report has thirty-eight, so I amend that to thirty-six. The two level adjustment upward for obstruction of justice is appropriate, which gives us an adjusted offense level of thirty-eight and a total offense level of thirty-eight. Defendant is criminal history category one. So under the guidelines, the sentence would be 235 months to 293 months. But as you will recall, there is a statutory maximum in this case. In no event could the Court sentence him to more than 240 months, so the practical range is 235 months to 240 months. The Defendant is not eligible for

probation. His supervised release term is two to three years; his fine, 25,000 to 250,000; and he would have to pay a $100 special assessment.

All right. Now I will address the downward departure issues. With regard to

* * *